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No. 91-614

In The

Supreme Court of the United States

October Term, 1991

NORTHWEST FINANCIAL, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND SAN DIEGO COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the
State of California

ROBERT D. MILAM*
Deputy Attorney General
1515 K Street
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5156

Attorneys for Respondent State Board of Equalization

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The petition for certiorari should be denied because it lacks a sufficient factual foundation. There is an inadequate record in this case to support a challenge to Proposition 13, either under equal protection or the right to travel. The petition for certiorari is, in effect, a request for an advisory opinion because of its lack of a factual foundation.

In addition, respondent Board of Equalization (hereafter "Board") believes certiorari should be denied on the

merits because Proposition 13 raises no true equal protection or right to travel issues. This Court, however, on October 7, 1991, granted certiorari in *Nordlinger v. Hahn, et al.*, United States Supreme Court No. 90-1912, wherein the constitutionality of Proposition 13 was challenged under the equal protection clause of the Fourteenth Amendment and under the constitutional right to travel. The Board will not repeat the arguments it made as Amicus Curiae in *Nordlinger* in opposition to the granting of certiorari.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER DOES NOT STATE SUFFICIENT FACTS TO RAISE EITHER THE EQUAL PROTECTION CLAUSE OR THE CONSTITUTIONAL RIGHT TO TRAVEL

In challenging Proposition 13, petitioner seeks an advisory opinion based on speculation because it seeks to raise federal constitutional issues without a sufficient factual record from the court below. The only "fact" which the California Court of Appeal had before it was that petitioner, a Nevada corporation, purchased residential property in California and under Proposition 13 this property was reassessed upon the change of ownership. The immediate result of the reassessment was that property taxes on petitioner's property were higher than the property taxes for the previous owner. The former owner had been assessed at $175,839 and the petitioner's property was assessed at its purchase price of $730,000.

There is no equal protection issue that arises from this fact because it was not shown at trial, nor alleged herein, that the difference between the value of the same property when owned by the former owner and the value when purchased by petitioner was discriminatory. Absent from the record is any alleged fact which supports a conclusion that the assessment of petitioner's property differed in any way from the assessment of any comparable property. Nor does petitioner present a single fact that it has been treated differently than other California residents and property owners. Assuming that the fact alleged by petitioner is true, it is not sufficient to raise an equal protection issue.

Petitioner is asking this Court to speculate that the facts of the *Nordlinger* case are also applicable to petitioner. The record below is totally inadequate to support such a conclusion. Petitioner is asking this Court to assume facts, which facts are not pled and are not in evidence, to arrive at the conclusion that petitioner requests. In light of the severe factual deficiencies of this petition, it should be denied. Precisely these same issues are presented in *Nordlinger*, but upon a better record than in this case. Since this Court is reviewing *Nordlinger* on the merits, it has no need to take another case presenting the same issues but which is based upon a poorly developed record.

In addition, there is an insufficient factual foundation to raise a denial of the petitioner's alleged constitutional right to travel. Although the textual source of the constitutional right to travel, or, more precisely, "the right to free interstate migration," is not entirely clear *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986), the

right has not been applied by this Court to corporations. Clearly, if the textual source is one of the privileges and immunities clauses (see *id.*), it would not apply to corporations. *Western & Southern L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 656 (1981). In the *Nordlinger* case, which has already been accepted by this Court for review of the right to travel argument on its merits, this issue is presented by an individual taxpayer. There is no need for this Court to grant the petition for certiorari in this case as well.

Even if corporations have a constitutionally protected right to travel, there is no allegation here and no facts below indicating any violation of the right in the purchase of the residential piece of property in California. There has been no showing that property taxes are higher in California than they are in Nevada or are imposed in such a way to inhibit the ability to move.

The only evidence below, and offered here, is that the residential property purchased by the petitioner corporation had higher property taxes after purchase than were the former owner's property taxes. There is no evidence below that petitioner was treated any differently than current residents of California, corporate or individual.

Such an inadequate factual foundation demands denial of this petition. The petitioner herein seeks to ride the coattails of the *Nordlinger* facts, which will be reviewed on the merits. To the extent that those facts are the basis of this petition, it should be denied and the *Nordlinger* case, not this case, should be the only case decided on the *Nordlinger* record.

CONCLUSION

Petitioner has invited this Court to decide constitutional issues without first having established an adequate record below. This Court should refuse the invitation and deny the petition for writ of certiorari.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Respondent
State Board of Equalization